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## THE POSSIBILITY OF NEW LEGAL OBLIGATIONS.

*"One thing I take to be clear, and it is this that public policy is a variable quantity; that it must vary and does vary with the habits, capacities and opportunities of the public."*<sup>1</sup>

### I.

Legal obligations and rights are the expressions of our ideas of public policy. One who regards the law, in so far as it is just, as springing from inborn and necessary conceptions of right and wrong has but to turn to legal history. Let him select what is to him the simplest example of a law following natural justice and trace the history of that law. He will generally find his own ancestors denying the obligation which he considers binding as a matter of necessary intuition. Take, for instance, the rule of our law, that he who has, with the skill of his hands, fashioned a useful article, owning the article, has a right to the proceeds of its sale. To us there is nothing which seems to spring more from the inborn necessities of things. We brush aside the fact that slavery has existed in almost every society which the world has known, on the ground that the institution is a wrong and contrary to nature. We quote with approval the words of Blackstone: "It is repugnant to reason, and the principles of natural law,

<sup>1</sup>Remarks of Mr. Justice Kekewich in *Davis v. Davis*, 36 Ch. D. 359.

that such a state should exist anywhere.”<sup>1</sup> But all who are familiar with our legal history, know that this rule of law, depends on the recognition of individual existence. In primitive society the individual only exists as an indistinguishable part of a large unit—his family or his tribe. The wrong of one member of a family can be wiped out by the death of another member, or a payment of the *wergeld* by the family of the wrongdoer to the family of the injured party. The Gods, angry at the sins of the evil members of a tribe, are propitiated by the sacrifice of any member of that tribe.<sup>2</sup> That the fruits of the labor of the individual should belong to the larger unit of which he formed a part is as natural to one stage of civilization as the opposite rule is to us. And both rules meet the requirements of a sound public policy. In early stages of social development isolation meant extermination, or, at least, precluded any advancement. Only those primitive peoples who can hold together overcome the adverse conditions resulting from primitive environment. Had the same strong feeling of individuality existed in a primitive society as in our own, the disintegrating forces would have been so strong that it would have been impossible to have had a continuous social life, and man could not have lifted himself out of barbarism. The rule of primitive law is suited to primitive conditions. On the other hand, once society has gotten over the embryo stage, there is much less danger of disintegration. When a strong sense of social unity has created a government able to protect the individual in his rights, and hold him as an individual responsible for his acts, then it would seem that the highest attainments of the civilization were only compatible with a wide freedom of individual action.

To take another illustration. The two fundamental rules of our law, the right of private property and the freedom of private contract, are usually accepted by us without question

<sup>1</sup> B. I., p. 423.

<sup>2</sup> In India, where new and old ideas are blended, in the dancing girl cast, the gains of science are divisible, that is, belong to the family of the worker as a whole, when gained while receiving a family maintenance: *Alasani v. Ralnachalam*, Madras H. C. Repts. 56.

as right, because they correspond to the conditions of our life. Yet neither existed in feudal times. Dual ownership of property, and status were the fundamental conceptions on which feudal society rested. The villain did not own the land he tilled or the cattle with which he tilled it. Both belonged, in one sense, to the lord, yet the lord had to give him the land and the cattle. The villain could not leave the land, and contract with another lord. Nor did he want to. His desire was to obtain a fixed status in the community; not to be free, but to owe certain services to some one. To be free, —that is, without a lord who would be responsible for him, was to be *flyma*, a fugitive, and the words of Athelstan must have had an ugly sound; “let whoever can come at him slay him as a thief.”<sup>1</sup>

The desirability of the sole ownership of property, the freedom to contract at will, wear different aspects in different stages of social progress. Our ideas of the desirable are the result of our conditions. There is no legal conception, however apparently fundamental, which time with its changes may not alter.

The thought here expressed receives almost universally a partial recognition. Most men of education can point out the main lines of development of the more fundamental of our legal conceptions. But it is curious to observe that so few recognize the possibility of any further change in the conditions of life which may affect a further radical change in our ideas. Rousseau and his followers regarded the complete freedom of the individual from governmental restraint as the final goal of civilization. Spencer, in spite of his half discovery of the principle of evolution, regards, the formula, that every man should have all the liberty that does not interfere with the equal liberty of any other man, as being continually necessary to all future progress. It is not that these men, and they are typical of a large class, do not look for further progress. They are apostles of progress. But that progress is always to be conditioned on the recognition of some idea concerning society, government or the individual. If we look at this idea, we will gene-

<sup>1</sup> Athelst, II., Sec. 2, cited in Andrews Old Saxon Manor, 12, 178.

rally find that their belief in it is due to the fact that it satisfies the best views of present public policy based on existing conditions. Take the example of the two men we have mentioned. The government which governed least was the best government for the eighteenth century. Liberty of opportunity, economic as well as political, has been the highest duty of society in the nineteenth century. Will it not be strange if changing conditions will not push some other idea forward as fundamental to the mind of the men of the twentieth century? The explanation of the mental attitude of which we speak lies in the fact that before they have projected their fundamental idea forward as the *sine qua non* of human progress, they have read it back into history, making history one long proof of how much better society as a whole would have been at every stage of its development, had it realized the beauty of the fundamental principle. Rousseau shows the advantage of freedom at all stages of progress, and Spencer points to the survival of the fittest among all animal life wherever the fullest liberty, compatible with equality, is allowed. Had these men not been engrossed in explaining their respective theories, they would have seen that many stages of past development were made possible by the practical application of principles the reverse of their own. Thus, the rise of the chief in the village community made it possible for the Western world to move out of primitive communism, and take its first great step in progressive civilization. Yet the rise of the chief destroyed equality, and curtailed the liberty of the great mass of the community. The result was great opportunity to the few, and the condition fitted the needs of the time. The Greek never passed the stage which makes economic inequality essential to progress. Plato, therefore, as our own publicists, reading history and all future in the light of the conditions which confronted him, made the slavery of the many the basis of his "Republic."

What is true of the theories of Spencer is true of Rousseau. Great upward movements of our race have been the result of a practical application of ideas, the exact opposite of that advocated by his school. Thus, in the Middle Ages, we find the evils of feudalism dying before a strong central gov-

ernment. The great architectural triumphs of that age and the beauty of the work of the artisans generally, bespeak the fact that the guild, with its direct interference with trade, produced laborers who must have gotten something out of life which ours do not get, to give so much to their art. However ill-suited the old mercantile system was to the last century, somehow a few centuries back, a country which maintained the balance of trade in its favor, was the successful country.<sup>1</sup> The result of all which is, that what is good for us may not have been good for our ancestors, or be of advantage to our descendants. A general recognition of this idea will have several beneficial results. It will improve our historical sense, and stop shallow criticism of our ancestors for not following what we think is the only right way. Again, it will enable those who discuss the value of any idea concerning law or government of men to select the phenomena which can throw light upon it.

## II.

If all our rules of law, no matter how fundamental are subject to change, with changing conditions, it may not be a wholly profitless task to inquire whether there are any changes going on around us which forbode a change in some of our fundamental legal conceptions. There are many things which are new in the nineteenth century. Industrial organization has undergone a profound change. With the general nature of the industrial change of our time all are familiar. It is the consolidation of the direction of industry in a few hands. Where there were at the beginning of the century small establishments, there are now large works ; involving the concentration of an enormous amount of labor and capital. These changes have not gone on equally in all branches of production. In agriculture there has been comparatively little development in the direction indicated. In transportation, the manufacture of sugar, the production of oil, anything, in short, where the capital necessary to produce any commodity at all is large, the consolidation of the direction of the industry in the hands of a

<sup>1</sup>This assertion is still a subject of dispute. See *contra*, Cunningham's "Growth of English Industry and Commerce."

few is complete. Other industries, where large capital to produce some result is not necessary do not seem to escape the tendency of the time. The small retailer gives place to the large department store; within the last few years the entire boot and shoe production has passed out of the hands of those who make boots and shoes to order and into the hands of the ready made shoe manufacturer. We might go on multiplying familiar instances *ad infinitum*, but the main fact remains—the real control of industry in many of its branches is in the hands of a few individuals or corporations.

Because law is the outcome of our environment, and because there are new conditions, it does not necessarily follow that any very radical change is going to take place in our law. The change from stage coaches to railroads made a vast difference in our means of transportation, but it did not introduce any new principles into the law relating to the carrier's liability for the safety of the goods committed to his care. But on the other hand, as I have tried to show, all law does depend on the proper public policy for the conditions which exist, and the changes in the conditions of life which have been going on for the past eighty years are great enough to produce the most profound changes in our law.

Industry may be said to consist in the production and exchange of commodities. Production requires land, labor and capital. The *entrepreneur* is the man who organizes the forces of production, and who owns and sells the completed product. The industrial changes of which we have been speaking are changes which affect primarily the *entrepreneur*. At the beginning of the century the laborer worked for wages and he still works for wages. The position of capital is substantially the same. The *entrepreneur* alone has changed. Relatively he has become a less numerous class. As an individual and on the average he employs more men and he sells more product. If there is to be any change in our law as a result of our new industrial life, it is to be in the relation of the *entrepreneur* with those with whom as *entrepreneur* he comes in contact; that is the laborer and the purchaser of his goods. We need not expect to find any change in the relation of

one laborer to another, or of one purchaser to another purchaser.

In our present law the relation of the *entrepreneur* to his men on the one hand, and the purchaser of the completed product on the other, is a purely contractual relation. It is an exchange of goods for money, or services for money, on the basis of a contract determined between the parties. The *entrepreneur* has a right to contract with whom he pleases for the work that he wants done, and, owning the completed product, he can sell it for the best price that he can get. The common law recognizes no obligation on the part of the workmen to labor, or the *entrepreneur* to employ him or pay him any certain wages. There is no obligation on the *entrepreneur* to part with his goods at a reasonable price.

The question which I desire to examine is this—Have the industrial changes of which I have been speaking affected, or are they likely to affect, the legal relation between the *entrepreneur* and the purchaser of goods on the one hand, or the laborer on the other; and first to turn to the *entrepreneur* as a seller of the completed commodity.

### III.

The common law has always regarded trade as of sufficient public importance to set aside the right of those who are engaged in it to do exactly as they please. The restrictions of the common law have not been directed to contracts between the seller and the buyer, but to contracts between sellers or producers among themselves to limit competition. Ever since the reign of Henry V.,<sup>1</sup> and probably from the time that trade was important to the State, an agreement between two persons to restrain one of them from exercising a particular trade or calling has been *prima facie* illegal.<sup>2</sup> The ground of this interference with the right of free contract has been, as a rule, the familiar maxim that "competition is the life of trade."<sup>3</sup>

<sup>1</sup> 2 H. V., pl. 22.

<sup>2</sup> *Horner v. Graves*, 7 Bing. 735; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173.

<sup>3</sup> *Hooker v. Vandewater*, 4 Denio (N. Y.) 349.

Thus Judge McIlvaine, in *Salt Lake City v. Guthrie*,<sup>1</sup> says: "Public policy unquestionably favors competition in trade to the end that its commodities may be offered to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public."<sup>2</sup> Mr. Arthur T. Hadley has an interesting article in the *Yale Review*,<sup>3</sup> in which he points out that while "the Roman Law allowed free determination of prices as a consequence of the unrestricted right of private property, the Common Law encouraged it as a means of supplying a market more fully and fairly than could be done in any other way. The common law both in its rule and exceptions recognize the public commercial end, which the Roman Law did not." The Roman Law left trade unrestricted because trade was of comparatively slight importance to the Roman people. A large portion of the industrial activity of Rome was the work of those whose products were consumed by their own masters.. Trade was not as it is with us the life of the state.

Not only have the Courts refused to enforce contracts between two or more producers regulating their output, or controlling prices, but both the United States and the several states have passed laws making such contracts between producers indictable offences. None of our Courts have intimated that these acts are unconstitutional as depriving the producer of his natural rights.<sup>4</sup> The spirit which passes these acts, and the spirit which accepts them as unquestionably unconstitutional, is the same spirit which led Judge Hull in the case from the Year Books, where the plaintiff sought to enforce an agreement of the defendant not to exercise his trade as a dyer for half a year, to exclaim: "*per dieu si le plaintiff fut ici, il irra al prison, tang il ut fait fine al roy*," and which led Chief

<sup>1</sup> 35 Ohio, 666.

<sup>2</sup> Judges, however, have doubted the validity of this maxim; see *Perkins v. Lyman*, 9 Mass. 521, and cases cited by Mr. G. S. Patterson in his work on "The Law of Contracts in Restraint of Trade."

<sup>3</sup> Vol. I., p. 56 (May, 1892). See for a discussion of this article one by the present author on "Can Prices be Regulated by Law," 32 AM. LAW REG. & REV. 9.

<sup>4</sup> *United States v. E. C. Knight Sugar Refining Co.*, 156 U. S. 1; *People v. North River Sugar Refining Co.*, 54 Hun. (N. Y.) 354.

Justice Parker, in *Mitchell v. Reynolds*,<sup>1</sup> to declare that, "to obtain the sole exercise of any trade throughout England was a monopoly and a crime." Thus, the State has always regarded one who trades as engaged in an occupation in which his freedom of contract is limited, whenever the exercise of that freedom interfered with the established views of what was public policy for the trade as a whole. It being considered that combinations among producers tending to control a market, are prejudicial to the interests of the people, any act having this effect is more or less a crime. In this instance the welfare of the State overrides the sacredness of the right of private contract.

It must be borne in mind that contracts in restraint of trade are declared illegal, not because an agreement between producers has any inherent viciousness, but because it tends, by stifling competitions between producers, to create a monopoly, placing the community which purchases the product at the mercy of the seller. Where the agreement has not this result it is upheld by the court.<sup>2</sup>

Thus, the answer of the early common law, and of our modern law, as far as we have followed the early spirit, to the tendency toward centralization in modern industry, is that when that centralization takes the form of an agreement between individual producers to submit to a joint control over their several businesses, the law will meet the economic tendency by declaring it illegal.

Prior to the last few years, agreements in restraint of trade of the kind discussed in the cases was the only way in which a monopoly could be created in an industry. But the increased familiarity of the business world with the joint stock company, or business corporation, has now rendered it possible for a monopoly to be secured, not by the agreement of distinct producers, but by the creation of a corporate entity as the sole producer. Take, for instance, the American Sugar Refining Company. This corporation produces practically all the

<sup>1</sup> 1 P. Williams.

<sup>2</sup> *Wickers v. Evans*, 3 T. & J. 318; *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

sugar in the United States, yet, in the old sense of the word, it is not an agreement in restraint of trade. The different producers of sugar sold out to the corporation. They did not agree not to re-enter the sugar refining business, yet business conditions make such a re-entry out of the question.

The result, which has caused the courts from the earliest times to declare contracts in restraint of trade illegal, exists. The contract is absent, but the buyer is none the less at the mercy of the seller. There are two ways in which the buyer can be protected. Either the law can say that the ownership by an individual or a corporation of all or substantially all, the means of production in a particular industry is illegal, or the State can undertake the work of fixing the maximum charge for the products of the industry.

In regard to laws rendering illegal the acquirement by one person, natural or artificial, of all the means of production in a single industry, it may be pointed out, that this is an attempt to make law run counter to what seems to be a natural economic tendency. The success of such legislation may well be doubted. Even if such success were possible, it might be sacrificing a great good to prevent one evil. In favor of the single producer, it can be urged that competition is ever producing the ruin of some of the competitors; that production is cheapened by consolidation; that while competition may be the life of trade, it often kills the trader, and that a society whose industries are not subject to great fluctuations, means a society in which the people are happier. There is something in this argument. But the thing which chiefly concerns us here is the legality or practicability of such legislation from a purely legal point of view. As far as a law limiting the amount of a certain kind of property which an individual can acquire is concerned, our courts, would certainly declare it unconstitutional. The right of a man to pursue happiness is synonymous with his right to acquire property, and the right to pursue happiness is written in every State constitution. The Fourteenth Amendment has placed it to some extent under the protection of the Federal Government. The attitude of our Federal judges towards such legislation is

undoubtedly hostile. Take, for instance, the expression of the members of the Supreme Court of the United States regarding the graded income tax law passed by the Fiftieth Congress. Justice Field says: "The income tax under consideration is marked by discriminating features which affect the whole law. . . . Whenever a distinction is made in the burdens a law imposes or in the benefit it confers on any citizens by reason of their birth or wealth or religion, it is class legislation, and leads inevitably to oppression and abuses and to general unrest and disturbance in society."<sup>1</sup> While Mr. Justice Fuller says: "Not that it (the law) is not open to abuse by such deductions and exceptions as might make taxation under it so wanting in uniformity and equality as in substance to amount to a deprivation of property without due process of law."<sup>2</sup> If this was the courts attitude toward a graded income tax we may know what it would be towards an act limiting the amount of property which an individual could acquire in business.

In regard to laws limiting the amount of property held by corporations, the peculiar relations of our State and national government make the difficulties in the face of such legislation practically insuperable. The United States cannot limit the property held by a corporation or, in fact, affect the business of producing in any way.<sup>3</sup> Each State could limit the corporations in its own State, but it cannot control the action of other States. A policy limiting the amount of property to be acquired by a corporation, to have any hope of success, must be adopted by all the States. But our States have never yet shown sufficient vitality to construct joint-state legislation. Any State which attempted to pass such legislation by itself would find that the result of its legislation would be the exodus of capital and energy from the State. Lastly, it may be seriously doubted how far such legislation could affect corporations already formed, and not impair the obligation of contract with the corporation contrary to the mandate of the

<sup>1</sup> *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 596.

<sup>2</sup> Rehearing, 158 U. S. 601, pp. 633-34.

<sup>3</sup> *United States v. E. C. Knight & Co.*, 156 U. S. 1.

Federal Constitution. From whatever side, therefore, economic or legal, which we regard the question, we are forced to the conclusion that if the consumer is to be protected, it must be from the side of price regulation, and not by an attempt to force back the wheels of economic change, and re-create a multitude of producers competing with each other.

Price regulation has this advantage ; it gets at the evil produced by the monopoly directly. As has been stated, the evil from the consumer's point of view is not the combination, neither is it the control of an industry by a single person, but the resultant position of all buyers who can buy only from one seller. The recognition of the right of the State to regulate prices would, in one sense, be a recognition of the old principle of the law that he who enters a trade must be limited in his right of contract where such limitation is necessary to secure to the consumers reasonable prices, that is, prices not greatly in advance of the cost of production. On the other hand, it would be a recognition of a distinctly-new right on the part of the buyer, and a corresponding obligation on the part of the seller ; the one to have and the other to sell at a reasonable price. While many will ask, will not the industrial changes going on around us make the recognition of the right and obligation necessary, none will deny the profound change, which will result in our most fundamental conceptions of private law.

The Legislature and the courts have taken a long step forward in the recognition of such a right. For many years the States have regulated the rates of fare charged by railway companies. The Supreme Court of the United States has upheld this legislation,<sup>1</sup> though the right to regulate interstate fare has been denied on the ground that such regulation was a matter exclusively for the federal government under the commerce clause of the Constitution.<sup>2</sup> The courts have recognized the right of the public to a reasonable charge in the absence of any legislation on the subject.<sup>3</sup> In *Munn v.*

<sup>1</sup> *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155.

<sup>2</sup> *Wabash, St. Louis & Pacific Railroad Co. v. Illinois*, 118 U. S. 557.

<sup>3</sup> *Cowden v. Pacific Coast S. S. Co.*, 29 Pac. Rep. 873 ; *Railroad Company v. Suttan*, L. R. 4 H. L. 238.

*Illinois*,<sup>1</sup> the Supreme Court upheld the constitutionality of an act declaring all grain warehouses public warehouses and regulating the charges for the storage of grain. The grounds of the decision were stated by Chief Justice Waite. He said that there existed a practical monopoly, and that the business of grain storage, as a whole, was essential to the proper handling of the grain of the country. This decision has been twice affirmed by the court, in *Budd v. New York*<sup>2</sup> and *Brass v. Stoeser*.<sup>3</sup> In both these cases, we have a dissent opinion by Mr. Justice Brewer, in which Mr. Justice Field and, in the last case, Justices Jackson and White concurred.<sup>4</sup> The ground of the dissent is set forth by Mr. Justice Brewer in *Budd v. New York*. He draws a distinction between a public use and public interest. A public use is a use which the State alone has a right to create and maintain. A highway is an example of such a use. If an individual does that work, he is, *pro tanto*, doing the work of the State. "The State doing the work fixes the prices for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work."

This public use is very different from a public interest. There is scarcely any property in the use of which the public has no interest. In reply to the suggestion that there is a monopoly, and that justifies legislative interference, he points out that there are two kinds of monopolies, one of law and one of fact. The former exists when exclusive privileges are granted by the State. "A monopoly of fact any one can break . . . Government can prescribe compensation . . . only when the property is in fact devoted to a public use."

"It may be noted here that Mr. Justice Field dissented in *Munn v. Illinois*. He also dissented in the *Granger Cases*,

<sup>1</sup> 94 U. S. 113.

<sup>2</sup> 143 U. S. 517.

<sup>3</sup> 153 U. S. 391.

<sup>4</sup> The court, therefore, stood five to four. It is curious to note that Mr. Justice Brown, who dissented in *Budd v. New York*, does not dissent in the later case. Had he done so, the principle in *Minnesota v. Illinois* would have been overruled, and the right of the State to regulate prices declared to be limited to occupations in which the right of eminent domain, or some other attribute of sovereignty, was necessary for the prosecution of the business.

*Chicago, Burlington & Quincy R. R. Co.*, and others following *Munn v. Illinois*, which upheld the right of a State to regulate the charge of railroads. In one of these cases, *Stone v. Wisconsin* (p. 181), he gives as his reason for his dissent that it takes the property of the corporation without due process of law. "Of what avail," he asks, "is the constitutional provision that no State shall deprive any person of his property except by due process of law, if the state can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?" He draws no distinction between a railroad company and another business not requiring the exercise of the right of eminent domain, or between a public and a private business. The Court, in the case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,<sup>1</sup> declared, Mr. Justice Field concurring, that the regulation in rates must be reasonable, and that the Courts were the only ultimate determinators of what was a reasonable rate. The objection urged by Mr. Justice Field against the *Granger Cases*, that the principle would result in the confiscation of railroad property, therefore falls. The present objection to *Munn v. Illinois*, which proceeds on the ground of a distinction between the companies doing the work of the State, was not thought of until some time after that case was decided. No case preceding *Budd v. New York*, makes any mention of such a distinction. The distinction, however, would be likely to occur to one who read the authorities cited by Chief Justice Waite in *Munn v. Illinois*. The first English authority cited is Lord Chief Justice Hale's treatise, "De Portibus Maris," 1 Harg. Law Tracts, 6. The author is speaking of the right to regulate prices. He then says, "If the king or subject have a public wharf, into which all persons that come to that port must come . . . because they are the wharfs only licensed by the Queen . . . or because there is no other wharf in that port, as it may fall out where a wharf is newly erected; in that case there cannot be taken arbitrary and excessive duties . . . but the duties must be reasonable and moderate." This is the law to-day: *Ensminger v. People*,<sup>2</sup>

<sup>1</sup> 134 U. S. 418.<sup>2</sup> 147 Ill. 384.

The other English authority is the case of *Allnutt v. Inglis*,<sup>1</sup> decided in 1810, and to it may be traced a suggestion of the idea that, in order to regulate the price, there must be a monopoly in law. A dock company owned a warehouse situated on one of its docks. An Act of Parliament permitted the storage of wines before payment of duties confining the privilege to the warehouse of this company. The court decided that the company must be content with a reasonable compensation. The facts of the case fall well within Mr. Justice Brewer's definition of a legal monopoly. Lord Ellenborough, who decided the case, bases his decision on the language of Lord Hale just quoted. He says that it "includes the good sense as well as the law on this subject." There is no intimation that he would not approve the regulation of the rates of charge where the monopoly was one of fact arising from the circumstance that there was only one warehouse in the port. There is a repetition of Hale's language on this point, without any comment. But the facts of the case before him made the following language, copying as it did part of the language of Hale all that was necessary: ". . . but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." As, heretofore, most of the monopolies of fact are also monopolies in law, it is natural that the thought should have been formulated by Mr. Justice Brewer, that only the prices of products, or services in which there was a legal monopoly, could be regulated by law.<sup>2</sup>

That this view is shared by almost, if not quite, a majority

<sup>1</sup> 12 East. 569.

<sup>2</sup> The American case cited by the court is *Mobile v. Fuille*, 3 Ala. (N.S.) 137. (This case cites all the early English Law on the subject). The Supreme Court of the State upheld the constitutionality of an act permitting the City of Mobile to regulate the price of bread. The decision of the court is placed on the public nature of the calling. The court points out that upon the same principle, "the country court is required at least once a year to settle the rates of inn keepers." The courts may have some criteria of what is a public interest, but none is intimated, and it would almost follow that all prices could be regulated by law, or at least that a monopoly in fact or law was not the only evidence that a business was affected with a public interest.

of the present members of the Supreme Court and by a great number of constitutional lawyers, must be admitted. Indeed, it is more than probable that it will soon be the settled doctrine of the courts. But if present economic tendencies are to continue, the real defect in the argument will become apparent. That defect lies in making a theory of government rather than social and economic conditions the basis of the rules of law. When a distinction is drawn between a monopoly of fact and one of law, it must be remembered that the distinction is a valid one as affecting the power of the State to regulate prices only, when conditions make a real difference in the power of the monopoly and the importance of controlling the price of its commodities. If a monopoly exists in fact in the production and sale of oil, and as a matter of fact it is impossible for any person natural or corporate to enter the business, the result is just the same to the consumer as if the production of oil was one which, according to Mr. Justice Brewer, "the public could create and maintain." It is not the public nature of the business, but the fact of the monopoly, and the importance of the business to the community which is the force behind State laws regulating the rates of fare on railroads.

Just now, following Mr. Hadley, I drew a distinction between the Roman Law and the Common Law, pointing out that the former allowed free determination of prices as part of the unrestricted right of private property, while the common law in its rules on this subject recognized the commercial end. The position of Mr. Justice Brewer in his argument, laying stress as it does on the importance of the free control of property by the owner, would seem an abandonment of the theory of the Common Law for that of the Roman Law. This change appears unfortunate, because at the bottom of the Common Law rules on this subject is the recognition of the fact that "trade is the life of the State." And, as we have pointed out trade is to us, as it was not to the Romans, of first importance. Unconsciously, Mr. Justice Brewer himself recognizes this. For, while adopting in part arguments appropriate to the Roman conditions, he really justifies his conclusion by trying to show that his position does not hurt

trade. He says: "A monopoly in fact any one can break," and indeed he intimates that all monopolies of fact are due to the superior service which the so-called "monopolist" gives the public. "It exists," he says: "Where any one by his money and labor furnishes facilities for business which no one else has," and he instances the case of a man who erects the only good office building in a city. If all monopolies of fact were of this character the distinction between monopolies of fact and law in connection with the legality of price regulation, might be a valid, and certainly would be a harmless distinction. But the economic facts are against the learned justice. There are already many monopolies of fact arising from other causes than superiority of service. And, if the prices of goods, when the production is practically monopolized, cannot be affected by law, then our law is in this condition: Agree with your competitor to raise prices, and we will put you in prison; but combine with your competitor, form a corporation, and you can charge what prices you want, the courts will declare all adverse legislation unconstitutional. Such a condition of our law will not long exist, except it be that the monopoly feature of production is to be confined to a few industries. If that feature is to be extended, we will be forced to recognize a new obligation on the part of the producer, an obligation to sell his goods at prices which the courts shall declare reasonable.

Next month I shall try to take up the question whether new economic conditions are likely to have any affect our legal conceptions of the relation of employer and employee.

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